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IN THE

Supreme Court of the United States

October Term, 1961

No. 251

MAURICE F. O'CONNELL, *et al.*,

Petitioners,

against -

JAMES E. ALLEN, Commissioner of Education of the State of New York, The State Education Department, Division of Professional Education, University of the State of New York,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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JAMES E. ALLEN, Commissioner of Education of the State of New York, The State Education Department, Division of Professional Education, University of the State of New York,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The respondents oppose the granting of a Writ of Certiorari to the Supreme Court of the State of New York, Albany County in the above entitled matter on the grounds that:

1. No substantial federal question is presented in this case; and
2. No attempt was made to raise a federal question in a timely manner.

Opinions Below

The decisions of the State Courts in this matter are set forth in Appendices "B" through "G" of the petition for

writ of certiorari and will not be repeated in this brief. It will be noted that the question presented to the State Courts was purely a question of construction of the State statute. The constitutional issues, now purported to be raised in this form, were not argued or decided.

Jurisdiction

Petitioner argues that the very nature of a proceeding under article 78 of the New York Civil Practice Act raises a federal question. It is submitted that there is no merit in such an argument.

A purported federal question must be "specially set up or claimed" and cannot be raised by inference. Oxley Stave Company v. Butler County, 166 U. S. 648, 653; Zadig v. Baldwin, 166 U. S. 485.

Petitioner further claims that a constitutional argument was presented at page 25 of his brief *amicus curiae* in the Wolfson case, and in Point IV of the brief in support of the motion for leave to appeal to the Court of Appeals (page 36).* Both of these arguments were to the effect that rights, which existed under a particular statute, could not be divested or negated by subsequent legislation. The New York Courts did not hold that petitioner's rights were divested by subsequent legislation. The decision of the

* At page 25 of the *amicus curiae* brief in the "Wolfson case", petitioners stated "rights which have arisen under the 1959 Law and which have not been waived cannot now be divested. The enactment of a changed Section 7403 does not defeat the claim of the appellant under the Law of 1959, and those similarly situated".

At Point IV in their brief to the Court of Appeals at page 36, petitioners state, "Under the provisions of the Fifth Amendment of the Constitution of the U. S., the rights asserted by them were statutory property rights, timely availed of and cannot be divested or negated by subsequent legislation".

State Courts involved simply the matter of construction of the statute as it then existed.

It is not sufficient to show that some constitutional question was raised. It must appear that the precise question on which it is urged this Court should take jurisdiction was passed on by the state court. Chapin v. Fay, 179 U. S. 127; Erie R. R. Co. v. Purdy, 185 U. S. 148.

Statutes and Regulations Involved

The section of the New York State Education Law, which specifies the qualifications necessary for the granting of a Certified Public Accountant, reads as follows:

> "§ 7403(2). An individual shall not be eligible to apply for a certificate as certified public accountant unless he has satisfactorily completed a four year high school course approved by the department for this purpose or the equivalent as determined by the commissioner, and either (a) has been graduated from a college, offering a curriculum in accounting which shall have been registered by the department, or (b) has been graduated from college and has had equivalent college training in accountancy as determined by the commissioner and has the professional experience required by the regulations of the commissioner and passes the examination required by the department or has passed, before the enactment of this article, all parts of the examination required by the department but has not received a certificate as a certified public accountant because of the lack of the professional experience required by the regulations of the commissioner. The department on the recommendation of the board may also accept in lieu of the passing of the whole or any part of the examination referred to herein, satisfactory proof of the passing of an examination of similar grade and content, or part thereof, given by the board of examiners of corresponding agency in another state."

The regulations of the Commissioner of Education so far as pertinent to this matter provide as follows:

§ 91. Professional requirements

1. The examination in certified public accountancy shall consist of

Group 1. The subjects of theory of accounts and of commercial law

Group 2. The subjects of practical accounting and of auditing

Candidates for the certified public accountant certificate who have been graduated from a college offering a curriculum in accounting which shall have been registered by the Department or otherwise have complied with the education requirements of the Education Law shall be entitled to admission to the subjects of group 1 of the examination.

2. Candidates shall be entitled to admission to the group 2 subjects of the examination

a. Who have passed the subjects of group 1 or

b. While sitting for the subjects of group 1 and

c. Who have completed three years' experience in the intensive diversified application of accounting principles and in the intensive diversified application of auditing procedures in the public practice of accountancy satisfactory to the State Board of Certified Public Accountant Examiners, subject to review by the Commissioner of Education. The said experience shall be completed not less than 90 days prior to the date of the examination. The State Board of Certified Public Accountant Examiner shall accept service in the Armed Forces of the United States subsequent to July 1, 1940, on the basis of one month's credit for each six months' service, with a maximum credit of eight months.

3. • • •

Section 7404 of the Education Law as in effect prior to the enactment of Chapter 718 of the Laws of 1959, provided as follows:

Former Section 7404,* the predecessor of the present Section 7403 provided as follows:

"§ 7404. Examinations; indorsement of certificates.

1. The certificate of certified public accountant of the state shall be issued, upon application to the department and the payment of a fee to be fixed by the department, which fee is to accompany the application, to any citizen of the United States, or to any person who has declared his intention of becoming such citizen, who resides within the state or has a place for the regular transaction of business therein, who is twenty-one years of age or over and of good moral character, who submits evidence satisfactory to the department of the possession of academic and professional qualifications for the public practice of accountance and who passes the examination required by the department; provided, that the certificate of certified public accountant of the state issued to any person who has declared his intention of becoming a citizen of the United States shall become void at the expiration of eight years from the date of the declaration of the intention of such applicant to become a citizen, unless prior to the expiration of said eight years evidence is furnished to the department that the applicant has become a citizen of the United States. Provided, further, that every candidate for examination for a certificate of certified public accountant of the state shall present evidence that he has graduated from a college offering a curriculum in accounting which shall have been registered by the department, or that he has graduated from college and has had equivalent college training in accountancy as determined by the commissioner of education, and that prior to the beginning of his course of study in such college he satisfactorily completed a four year high school course approved for this purpose or the equivalent as determined by

* Repealed by Ch. 718, L. 1959.

> the commissioner of education. The department on the recommendation of the board may also accept in lieu of the passing of the whole or any part of the examination referred to herein, satisfactory proof of the passing of an examination of similar grade and content, or part thereof, given by the board of examiners or corresponding agency in another state."

Petitioners refer in the petition for a writ of certiorari to the amendment to Section 7403, subdivision 2 of the Education Law by Chapter 332 of the Laws of 1960. This amendment took place after the applications of petitioners had been filed and acted upon and is not pertinent to this matter. It was never contended by the respondents, nor held by any of the Courts below, that this amendment had any bearing upon the petitioners' rights under the statutes as it existed prior to such amendment.

Statement of the Case

Petitioners seek the issuance to them without taking a written examination of a certificate of certified public accountant. The applications have been denied. The sole issue is the contention by petitioners that under the construction of the statute for which they argue, graduates of registered schools are not required to have any experience or take any examinations.

The proceeding was commenced in Supreme Court, Albany County. The decision of the Supreme Court is Appendix "F", page 27 of the petition for certiorari. An appeal was taken to the Appellate Division. The petitioner stipulated at this stage that the decision of the Appellate Division in Matter of Wolfson, a similar proceeding, would be deemed to be the decision in this proceeding and petitioner submitted a brief and participated in the oral argument of the Wolfson case. The decision of the Appellate

Division unanimously affirmed the decision of the Supreme Court, rejecting petitioners' contentions (Appendix D-1, page 21 of the petition for writ of certiorari). Thereupon, petitioner moved for leave to appeal to the Court of Appeals which motion was denied by the Appellate Division (Appendix "C" page 17 of petition). A similar motion was denied by the Court of Appeals. (Appendix "B" page 15 of petition). The opinion of the Supreme Court, Albany County, in Matter of Wolfson (unreported) is appended hereto as Appendix A.

ARGUMENT

The question decided by the State Courts was solely the construction of a state statute. The decision did not deprive petitioners of any right secured by the Fifth or Fourteenth Amendment to the Federal Constitution.

The sole issue in the case is petitioners' contention that the amendment of Section 7403 by Chapter 718 of the Laws of 1959 eliminated the requirement of experience and examination in the case of a candidate who graduated from a college offering a registered curriculum in accounting. Consequently, the sole issue is the construction of the state statute and, in this construction, there is no constitutional question.

In order to indicate the lack of such constitutional question, we summarize the argument presented to the Appellate Division of the Supreme Court of the State of New York in this matter.

Assuming for the purposes of argument that there is some ambiguity in the language of Section 7403 of the Education Law as amended by chapter 718 of the Laws

of 1959 it then becomes necessary to look to the intent of the legislature in enacting the statute. In this connection there were presented a number of exhibits in Matter of Wolfson. Respondent's Exhibit A (56-60*) is a copy of the memorandum of Governor Rockefeller in connection with the approval of the law. Exhibit B (61-71) is a letter dated February 17, 1959 to Counsel for the State Education Department by the President of the New York State Society of Certified Public Accountants explaining the changes which had been made prior to the introduction of the bill in 1959 to meet certain objections which had been made to the bill as introduced at the 1958 session. Exhibit C (72-81†) is a copy of the memorandum of the Education Department to the Governor in connection with the bill and Exhibit D (82-111) is a copy of the legislative brief of the New York State Society of Certified Public Accountants which society sought the introduction and enactment of the legislation.

All of these documents indicate that the single purpose of the enactment of this statute was to bring under regulation the entire field of the practice of public accounting. Theretofore any person could practice as a public accountant without restriction. The only thing which had been restricted was the use of the title certified public accountant which was limited to those who had received the certificate upon meeting the statutory requirements of education, experience and examination. The motivating force for the new legislation was the belief that it is in the public interest that all persons practicing public accounting in the State

* Figures in parentheses refer to folios of record on appeal in *Matter of Wolfson*.

† Figures in parentheses refer to folios of record on appeal in *Matter of Wolfson*.

be subject to regulation of professional conduct, in view of the importance to the people of the state of the profession of public accounting as it had developed over the years.

It would be entirely contrary to the intent of the statute to lower the standard for the granting of a certificate of certified public accountant which from the time of its first inception in 1896 has been a certificate showing that the individual has met a high standard of professional competence in respect to education and experience as well as by passing a comprehensive examination. To construe the statute so that the examination and experience is not required in the case of candidates who have graduated from a school having a registered curriculum is to contend for an unreasonable and strained construction, bordering on the absurd.

The alternatives presented in clauses "a" and "b" of Subdivision 2 of Section 7403 have to do with whether or not the candidate attended a registered school or a school which provides an equivalent program. The result of attending either type of institution is substantially equivalent. The next step is for the candidate to have acceptable experience and the last step is the passing of the examination. Under the regulations, of course, the candidate may take the subjects of Part I of the examination after he has completed his education and pending the completion of his experience. The differences between a registered curriculum and one which would be approved as an equivalent would not be of sufficient importance to justify a reasonable conclusion that experience and examination are not required in the case of the graduate of a registered curriculum.

What was done in Section 7403, subdivision 2, was simply to restate the provisions of the law in effect prior thereto.

Because of the addition of new provisions relating to enrollment of public accountants in the bill, the existing provisions of the statute were rearranged and this is the reason for the change in the number of the section. To adopt the petitioner's contention with respect to this statute would be to conclude that the New York State Society of Certified Public Accountants, which represents that profession, and the primary purpose of which is to safeguard the standards of that profession, was urging adoption of a bill which would entitle any graduate of a registered curriculum to become a certified public accountant without any further qualification on his part, whereas over the years present practitioners have been required to meet the standards not only of education but of experience and examination in order to obtain the certificate which is so highly valued as an evidence of the attainment of expertness in this field. This is certainly contrary to any reasonable construction.

Present section 7403 is simply a restatement of the long standing requirements for the certificate of certified public accountants and nothing more.

Judge Elsworth, dismissing appellant's petition in Supreme Court, Special Term, said:

> "In enacting section 7403(2) of the Education Law, the legislature had no intent to set aside a basic requirement so long existing. Chapter 718 of the Laws of 1959 was intended to bring under regulation the entire field of public accounting. In redrafting the sections relating to Certified Public Accountants, there in not the slightest indication that the legislature and executive branches contemplated a softening of the requirements for applicants seeking certification under that classification."

It is interesting to point out that, in 1896 when public accountants were first certified, the *sole* method for a new

accountant to obtain certification was by examination. Up until 1927, when the Certified Public Accountant statute was part of the General Business Law of New York State (Article 8, §§ 80-82), the successful passing of an examination was still required of *all* candidates. By chapter 85 of the laws of 1927, the Certified Public Accountant statute was transferred to the Education Law, and examination still remained the only method of certification. Chapter 261 of the Laws of 1929 provided for an alternate method of licensure, *viz.*, endorsement of a license obtained in another state. The only other exception to the examination requirement was the enactment of chapter 340 of the laws of 1947, providing for the issuance of a certificate without examination to persons who had had *fifteen years of experience* in the intensive application of accounting principles and auditing procedures. This statute remained in effect only one year, being repealed by chapter 629 of the laws of 1948. The Court will note that in this isolated instance when examination was waived the substitute was experience not for three years as the regulations require for admission to the examination, but for fifteen years and that experience had to be of intensive quality. The statute presently before the Court, continues the statutory policy which has been with us since 1896, except for one year of the grandfather clause based on fifteen years of intensive practical experience.

An intention to change a long standing rule will not be imputed to the Legislature in the absence of a clear indication of such intention. (McKinney's Statutes, Section 153; *Buduson* v. *Curtis*, 285 App. Div. 517, aff'd 309 N. Y. 879; *Leach* v. *Anwell*, 154 App. Div. 170; *People ex rel. Desiderio* v. *Connolly*, 212 App. Div. 102.)

Clearly no such drastic change in the law governing the granting of the certificate of Certified Public Account is to be implied in the present case.

Furthermore, under the rules of statutory construction an interpretation of a statute which leads to an unreasonable result is presumed to be against legislative intent and must be avoided. (McKinney's Statutes, Section 143; *Seltzer* v. *City of Yonkers*, 286 App. Div. 557, aff'd 1 N. Y. 2d 782; *East* v. *Brooklyn Heights R. R. Co.*, 195 N. Y. 414; *People* v. *Ryan*, 274 N. Y. 149, 152.)

It is a fundamental rule of statutory construction that even literal language must give way to give effect to the legislative intent. "Strict grammatical rules should not prevail over the manifest sense of the language". (*People* v. *Gates*, 56 N. Y. 387, 2 Cow. Cr. R 67.)

The Courts of this state, reasserting a common rule of construction, have stated that the "proper interpretation requires adherence to the plain, common sense meaning of the language contained in the statute, rather than an application of refined and technical rules of grammatical construction". (*Universal Oil Products Co.* v. *Shell Development Co.*, 196 Misc. 497, aff'd 276 App. Div. 1058, aff'd 301 N. Y. 649; *Butterfield* v. *Rudde*, 58 N. Y. 489; *Kaufman* v. *Schoeffel*, 77 Hun. 140.)

In his memorandum, dismissing the petition of the appellant herein, Judge Elsworth said, "A rigid grammatical construction of the section may justify petitioner's conclusion. However, the law has long since discarded precise formalism and no Court should dignify the absence of a comma as a talisman without probing behind the literal meaning".

It is well recognized that a long continued course of action by state and federal administrative officers is entitled to great weight unless manifestly wrong. (McKinney's Statutes, Section 129.)

In *Mounting and Finishing Co.* v. *McGoldrick*, 294 N. Y. 104, 60 N. E. 2d 825, Judge Desmond said:

> "Of course, statutory construction is the function of the courts, 'but where the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially, the reviewing court's function is limited', National Labor Relations Board v. Hearst Publications, 322 U. S. 111, 131, 64 S. Ct. 851, 860, 88 L. Ed. 1170. The administrative determination is to be accepted by the courts 'if it has "warrant in the record" and a reasonable basis in law' (same citation). 'The judicial function is exhausted where there is found to be a rational basis for the conclusions approved by the administrative body'."

The petitioner is contending that the Legislature intended to require those applicants who had graduated from a college and have had equivalent college training in accounting (equal to the colleges whose curriculum has been registered by the Department) as determined by the Commissioner of Education to possess professional experience and successfully complete an examination but those applicants who have graduated from a college whose curriculm in accounting has been registered by the Department need not possess such experience and take an examination. To construe this statute in this manner would indeed violate the Constitution. *In both cases the college preparation is equal. A college whose curriculum has been registered is offering no better preparation in accountancy than those other colleges whose graduates would be accepted under alternative (b).* Those graduates complying with alterna-

tive (a) are, as expressly provided in the statute, equal in every regard to those complying with alternative (b). To require applicants who comply with (b) to have experience and pass an examination and not require those applying under (a) to do so would be to discriminate against them and constitute a violation of their rights to equal treatment as guaranteed by the Fourteenth Amendment.

Conclusion

For the foregoing reasons the petition for writ of certiorari to the Supreme Court of the State of New York should be denied.

Respectfully submitted,

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Appendix "A"

SUPREME COURT—ALBANY COUNTY

In the Matter
of
The Application of HYMAN WOLFSON,
Petitioner,
for an Order under Article 78 of the Civil Practice Act,
against
THE STATE EDUCATION DEPARTMENT DIVISION OF PROFESSIONAL EDUCATION UNIVERSITY OF THE STATE OF NEW YORK,
Respondent.

(Albany Special Term, October 23, 1959.)

Appearances:
Hyman Wolfson, Petitioner in Person,
Charles A. Brind, Esq., (John P. Jehu, Elizabeth M. Eastman and George B. Farrington of counsel) Attorney for Respondent.

MEMORANDUM

ELSWORTH, J.

In this article 78 proceeding petitioner seeks to compel the Commissioner of Education to license him as a Certified Public Accountant. He claims that he satisfies the educational requirements of subdivision (a) of section 7403 (2) of the Education Law and therefore is not required to take an examination. It is his contention that such an inter-

pretation is the only grammatical and reasonable construction of said section as enacted as part of Chapter 718 of the Laws of 1959.

A rigid grammatical construction of the section may justify petitioner's conclusion. However, the law has long since discarded precise formalism and no court should dignify the absence of a comma as a talisman without probing behind literal wording. Since 1896, with one exception, the passing of an examination has been a prerequisite to the licensing of a Certified Public Accountant. In enacting section 7403 (2) of the Educational Law, the legislature had no intent to set aside a basic requirement so long existing. Chapter 718 of the Laws of 1959 was intended to bring under regulation the entire field of public accounting. In redrafting the sections relating to Certified Public Accountants, there is not the slightest indication that the legislature and executive branches contemplated a softening of the requirements for applicants seeking certification under that classification.

The petition is dismissed accordingly.

Submit order.

November 25, 1959.

Appendix "B"

McKinney's Statutes

§ 143 Unreasonableness

It is a general rule in the interpretation of statutes that they shall receive a reasonable construction. A forced, unnatural, or ridiculous construction, which might tend to bring contempt upon the administration of justice is to be shunned. An interpretation which is contrary to the dictates of reason or leads to unreasonable results is presumed to be against the legislative intent, and some other construction should be placed on the statute, if possible without violation of its language. Whenever the language of an enactment admits of two constructions, the more reasonable of the two should be adopted as that which the Legislature intended. For example, it is unreasonable to suppose that the Legislature would commit to a fire commissioner the discretionary power of requiring slight precautions to be adopted for the avoidance of fires, and deny him the power of requiring effective precautions: and hence a construction of a statute along such lines is avoided. But, if the statute is plain and unambiguous, the courts cannot revise it so as to harmonize it with their conception of reason. It is within the power of the lawmakers to enact an unreasonable law, and if they have done so in clear language, their patent intent must be effectuated by the courts.

Appendix "C"

McKinney's statutes

§ 153 Change in long established rule

An intention of making an innovation in a long established rule of law is not imputed to the Legislature in the absence of a clear manifestation of such intention. Especially is this so, when the change opens the path for hardship, injustice, absurdity, inequality, or other objectionable consequences. This principle is analogous to the doctrine that statutes in derogation of the common law are to be strictly construed. When fundamental principles are overthrown and where the general system of the laws is departed from, the legislative intention must be clearly expressed. Even a practical construction which a statute has received will not be abrogated by the courts where the effect of a change in a rule would cause great mischief.